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FEDERAL COMMUNICATIONS COMMISSION
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**Before the**

**FEDERAL COMMUNICATIONS COMMISSION**

**Washington, D.C. 20554**

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| GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License | ) | CC Docket No. 98-184 |
| Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules | ) | CC Docket No. 98-141 |

# COMMENTS OF THE
# COMPETITIVE TELECOMMUNICATIONS ASSOCIATION


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List A B C D E

TABLE OF CONTENTS

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**COMMENTS OF THE**

**COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these comments in response to the Commission's *Public Notice* in the above-captioned proceeding.[1] While CompTel does not oppose grant of the relief requested by Verizon,[2] CompTel submits that the Commission must take steps to ensure that termination of the Verizon affiliate does not result in harm to the public.[3] In particular, the Commission must

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1 *Public Notice*, Pleading Cycle Established for Comments on Verizon's May 1st Letter Filed Concerning Relief from Bell Atlantic/GTE Merger Conditions, DA 01-1325 (May 31, 2001) ("*Public Notice*").

2 Letter from Gordon R. Evans, Vice President, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, FCC (May 1, 2001), filed in CC Docket 98-184.

3 While the actions proposed herein have specific application to Verizon, in light of its request for modification of the merger conditions, they should apply to SBC and other ILECs as well.

clarify Verizon's post *ASCENT*[4] 251(c) duties and obligations, and Verizon must demonstrate its compliance with these requirements, before termination of the Verizon affiliate.

The Commission approved the merger of Bell Atlantic and GTE[5] subject to conditions designed to offset the public interest harms associated with the transaction.[6] Among the conditions is a requirement that Verizon maintain its separate advanced services affiliate for nine months after a "final and non-appealable judicial decision . . . determines that the separate Advanced Services affiliate must be deemed a successor or assign of the incumbent LEC for purposes of 47 U.S.C. §§ 153(4) or 251(h)."[7] At this point, Verizon has certainly not carried its burden of proof to justify any modification to the merger conditions. Since the merger conditions were necessary to offset the harm otherwise created by the merger,[8] Verizon must demonstrate that any suspension or modification is proper[9] and does not upset the careful balance created by this Commission's approval order. As noted below, the Commission should require Verizon to make an additional filing that is compliant with its burden, with an appropriate comment period thereafter.

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4 *Association of Communications Enterprises v. FCC*, Case No. 99-1441, slip op. (D.C. Cir. January 9, 2001) ("*ASCENT*").

5 GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd 14032 (2000) ("*Verizon Merger Order*").

6 *See, for example, Verizon Merger Order* at ¶3: "[A]bsent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services," while "the asserted public interest benefits of the proposed merger will not outweigh these public interest harms." *See also* ¶¶ 4, 246, and Appendix D.

7 *Public Notice* at page 1, *citing Verizon Merger Order*, App. D, Condition 11c.

8 *See note 6, supra.*

9 *See, for example,* 47 U.S.C. §416(b), which permits the Commission to suspend or modify its orders upon notice and "in such manner as it shall deem proper."

The *ASCENT* decision clearly stated that SBC/Ameritech cannot avoid its resale obligations for advanced services through the use of a separate affiliate. The 251(c)(4) obligations therefore apply to Verizon immediately, regardless of any transition period specified in the merger conditions.[10] Unfortunately, the efforts by Verizon and SBC to evade or nullify the *ASCENT* decision require the Commission to take immediate actions to clarify these ILECs' obligations and ensure compliance with applicable legal and regulatory requirements. It should not matter whether Verizon provides advanced services through a separate advanced services affiliate, as this should not and cannot affect Verizon's obligations under the Communications Act.[11] It is essential that the Commission clarify that all resale requirements applicable to xDSL offerings before the affiliate started to provide advanced services are fully "reinstated."

Further, the Commission should clearly state that Verizon cannot avoid its section 251(c)(4) obligations simply by selling DSL services through its advanced services affiliate to an affiliated ISP, nor can Verizon protect its monopoly (or illegally leverage its market power) by tying the availability of resold DSL services to its own voice service. In addition, Verizon cannot make resold DSL more expensive or more difficult to obtain through an affiliate than if purchased through the ILEC by imposing different ordering, provisioning and/or repair procedures, or mandating the use of inconsistent OSS interfaces. Any such practices constitute unreasonable restrictions on resale in violation of section 251(c)(4).

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[10] While the *ASCENT* decision involved the Commission's order approving the merger of SBC and Ameritech, its holding applies with equal force to the analogous Verizon merger condition.

[11] 47 U.S.C. §151, *et. seq.* ("*the Act*").

## I. VERIZON MUST DEMONSTRATE THAT IT HAS COMPLIED AND WILL CONTINUE TO COMPLY WITH THE ACT'S REQUIREMENTS PRIOR TO ANY SUNSET OF THE MERGER CONDITION

Prior to any grant of the relief requested (or before the end of the transition permitted under the merger conditions themselves), the Commission must ensure that Verizon is in full compliance with section 251 of the Act and that ongoing compliance by Verizon can be reasonably assured. Should the Commission grant the accelerated transition requested by Verizon, it must do so in a manner consistent with the intent of the transitional mechanisms envisioned by the original nine-month transition period, so that critical competition and consumer safeguards will not be lost. The purpose of the nine-month period was to give the Commission time to adopt any further clarifications or transitional requirements necessary to protect competition and the public interest. [12] CompTel does not oppose truncating that period so long as the Commission takes all necessary actions before the transition period ends.

First and foremost, the Commission must ensure that Verizon is in compliance with all current legal and regulatory requirements applicable to advanced services, particularly in light of the *ASCENT* decision. A demonstration of compliance, prior to the sunset of the separate affiliate requirement, is absolutely necessary in light of Verizon's deleterious conduct to date. Verizon has, for example, limited the availability of DSL for resale to those instances where it is the voice provider – tying DSL resale to its voice service.[13] As a result, of course, competitors

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12 The Commission stated its expectation that Verizon would "implement each of [the] conditions in full, in good faith and in a reasonable manner to ensure that ***all telecommunications carriers and the public*** are able to obtain the full benefits of these conditions." *Verizon Merger Order* at ¶256 (emphasis added).

13 See, for example, Consultative Report on Application of Verizon Pennsylvania, Inc., for FCC authorization to provide In-region InterLATA Service In Pennsylvania, PA PUC, Docket No. M-00001435, *Transcript of Further En Banc Hearing*, April 26, 2001, pages 264, 274-276. ("*PA PUC 271 Transcript*")

providing voice service via the UNE platform are prevented from reselling Verizon's retail DSL service, in violation of the Act.[14] The Commission has foregone previous opportunities to stamp out this injurious practice,[15] and it must now act swiftly to ensure that these unlawful tying arrangements cease and do not recur.

Verizon also must be able to demonstrate that it is making DSL available on a resold basis pursuant to section 251(c)(4) of the Act.[16] CompTel does not propose a burdensome demonstration or lengthy proceeding. Indeed, Verizon should simply file a document demonstrating the manner in which it will comply with its legal obligations under section 251(c) of the Act once advanced services are transitioned from the advanced services affiliate to the ILEC. This document should be available for comment by parties, and should form the basis of the Commission's decision on whether to grant Verizon the relief requested.

CompTel also proposes that the Commission clarify or address the following issues. First, to the extent Verizon asserts that its avoided costs for DSL differ from those of other services for which discounts have already been established, the Commission could require that Verizon honor the current discount rates until such time as it has proved (within the context of an arbitration or generic state rate-making proceeding) that its avoided costs are in fact divergent.

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14 47 U.S.C. §251(c)(4)(A) requires, of course, that "any telecommunications service that the carrier provides at retail" be made available for resale. Additional violations of the merger conditions themselves are detailed below.

15 Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98*, FCC 01-26 (rel. Jan. 19, 2001) ("*Line Sharing Reconsideration Order*"). As CompTel explained in its comments in this proceeding, the practice of tying DSL with voice and Internet services poses many competitive dangers to those complementary product markets.

16 47 U.S.C. §251(c)(4).

Second, the Commission should clarify that CLECs are able to use a single interconnection agreement to cover all section 251 obligations,[17] specifically including but not limited to the availability of DSL services for resale.[18] While such a clarification may seem unnecessary, CompTel would remind the Commission of the games Verizon played with the language in the *Verizon Merger Order* related to Most Favored Nation (MFN) provisions.[19]

The Commission must also ensure that current auditing and reporting practices required by the Verizon merger conditions will be revised to reflect the fact that advanced services will now be provided by the ILEC rather than by the advanced services affiliate. The audits and carrier-to-carrier performance reports required by the merger conditions must be maintained so that both the Commission and industry participants have the ability to detect discriminatory behavior with regard to DSL and advanced services.[20] Indeed, these practices may actually need to be strengthened, since prior audits have revealed violations of the merger conditions, and it will likely be even more difficult to discover evidence of discrimination once the separate affiliate requirement sunsets.

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17 47 U.S.C. §251.

18 SBC, Verizon's RBOC sibling, has required competitors to execute separate interconnection agreements to address both voice and advanced services.

19 *Verizon Merger Order*, Appendix D, ¶ 32. Verizon's imaginative interpretation of these obligations was recently addressed by CompTel in another pleading in this docket, filed April 30, 2001. Particular care must be taken in crafting appropriate language to avoid limiting this requirement in any fashion, to preempt any Verizon attempts to exploit what it may perceive as a loophole – just as Verizon did with reference to the MFN merger conditions.

20 "The Commission and the public are relying on the independent auditor to perform a thorough and systematic evaluation of Verizon's compliance with the UNE and line sharing requirements." Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Jeffrey Ward, Verizon Communications, granting extension of time to file audit report in compliance with the Bell Atlantic/GTE Merger Conditions, CC Docket 98-184, page 2 (December 21, 2000).

The collocation audit revealed, for example, that Verizon has been providing collocation to its advanced services affiliate on preferential terms – in some cases for free.[21] Verizon also interpreted the scope of the audit as it relates to advanced services in an unreasonably narrow fashion, and failed to meet its obligation to post accurate collocation space availability information on its website.[22] Since the Commission determined that without the merger conditions the union of Bell Atlantic and GTE was not in the public interest[23] it must ensure compliance with what the Commission has deemed essential conditions. Without adequate compliance, ***and verification***, it is simply not possible for the Commission to conclude that the union of Bell Atlantic and GTE remains in the public interest.[24] The Commission must therefore continue the current reporting and auditing requirements, while considering appropriate modifications and enforcement practices to enhance their effectiveness.

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21 *Report of Independent Public Accountants (Arthur Andersen LLP) – Collocation Examination*, CC Docket 98-184, January 29, 2001, page 2.

22 *Id.* at pages 2-3. It is certainly worth noting that all of the deficiencies listed in the Auditor's report were observed during a very brief four month period (July-October, 2000), and that the Verizon Report of Management on Compliance that was filed with the Auditor's report limits its assertion of compliance to that same "Evaluation Period." *Report of Management on Compliance With the FCC's Collocation Rules*, dated January 29, 2001, page 1.

23 *See, e.g., Verizon Merger Order* at ¶¶ 3, 246.

24 "If Bell Atlantic/GTE does not fulfill its obligation to perform each of the conditions, pursuant to our public interest mandate under the Communications Act we must take action to ensure that the merger remains beneficial to the public. We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of Bell Atlantic/GTE into the current Bell Atlantic and GTE companies. Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public." *Verizon Merger Order* at ¶256

## II. COMMISSION DIRECTION IS NECESSARY FOR QUICK AND UNIFORM IMPLEMENTATION

In the absence of clear policy guidance from the Commission, various issues stemming from the *ASCENT* decision and the Verizon merger will be litigated on a state-by-state basis. This will tax the resources of competitive local carriers at a time when they have little or no access to capital markets, and waste valuable and often scarce resources of the state commissions. Further, state-by-state litigation will likely result in multiple, potentially conflicting decisions. As the Commission knows full well, the ILECs are gifted at transforming any inconsistency or uncertainty into tools to defeat competitive local entry.

Implementation of the ASCENT decision has already created a great deal of confusion in the context of the state 271 investigations. In the Pennsylvania section 271 investigation, Verizon stated that since the Verizon Advanced Data affiliate (VADI) only provides DSL on a line-shared basis, a non-affiliated competitor can only resell VADI's DSL service if Verizon provides the underlying voice service.[25] If another carrier provides the voice service - either on a resale basis or through UNE-P - Verizon would consider this to be a line-splitting arrangement and would not permit the competitor to continue reselling DSL to the end user.[26] In fact, the end-user's DSL service would be disconnected.[27] Despite these violations of the Act, the Pennsylvania PUC, by a 3-2 vote, lent its support to a 271 filing with the Commission.[28]

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25 *PA PUC 271 Transcript* at pages 264, 274-276.

26 *Id.*

27 *Id.* at pages 276-279, 281.

28 Consultative Report on Application of Verizon Pennsylvania, Inc., for FCC authorization to provide In-region InterLATA Service In Pennsylvania, PA PUC, Docket No. M-00001435. *See,* however, Dissent of Commissioner Brownell.

In its own section 271 proceedings, SBC/Ameritech[29] has argued that DSL resale should not be part of any third-party OSS tests since it is provided by an affiliate and is therefore not part of the section 271 review. Such a position is clearly at odds with the ASCENT decision, which states that SBC/Ameritech ***cannot*** avoid the resale and unbundling obligations through the use of an affiliate. In fact, an ALJ with the Indiana Utility Regulatory Commission issued a decision just this week concluding that "Ameritech Indiana is attempting to avoid its clear section 251 obligations by reliance on its creative corporate structure."[30] Fortunately, the ALJ directed Ameritech to include DSL resale and associated performance measures in the third-party OSS test.

Verizon and SBC are clearly using the separate affiliate condition to impose terms and conditions that severely limit the availability of DSL resale.[31] Since the *ASCENT* court found that the advanced services affiliate structure cannot limit an ILECs' section 251(c)(4) obligations, various states are or will be considering how to remove the ILECs' separate affiliate shield in the wake of that decision. Since it was this Commission that accepted Verizon's (and

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29 Although the instant proceeding addresses only the Verizon merger conditions, CompTel believes that it is appropriate for the Commission to consider the effect of the ASCENT decision on the almost identical SBC/Ameritech separate affiliate merger condition. CompTel urges the Commission to request comments on the establishment of appropriate rules for other similarly situated RBOCs in this regard.

30 Petition of Indiana Bell Telephone Company, Incorporated, D/B/A Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of The Telecommunications Act of 1996, Cause No. 41657, *ALJ Decision on First Request for Expedited Dispute Resolution*, page 5. (*"Indiana Decision"*)

31 The IURC ALJ found, for example, that Ameritech was "attempting to mask its responsibility." *Id.* The Commission must prevent all Verizon and SBC BOCs from considering such corporate shell games.

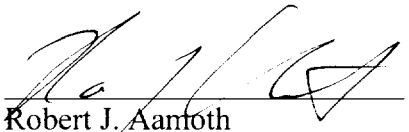
SBC's) proffered merger conditions,[32] it is this Commission that should clarify precisely how the removal of this condition should be implemented – in a simple, uniform, and expeditious manner. The Commission also should ensure compliance and assure itself of compliance with the requirements of the Communications Act, with specific regard to the 251(c)(4) obligations as they relate to advanced services, prior to granting Verizon's request for relief.

## III. CONCLUSION

In light of the foregoing, CompTel respectfully request that the Commission approve Verizon's request only upon the terms recommended herein.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOC.

By: 

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[32] *See, e.g., Verizon Merger Order* at ¶¶1, 19, and Application of Ameritech Corp, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999), ¶¶1, 5, 354.

**CERTIFICATE OF SERVICE**
**CC Docket No. 98-184**

I, Michelle L. Arbaugh, hereby certify that on this 14th day of June, 2001, copies of the foregoing were served via hand-delivery on the following:

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